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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1974

No. 73-7060

FREDERICK E. HERNON,
Petitioner,

v.

REVERE COPPER AND BRASS, INC.,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INDEX

	Page
Question Presented for Review	1
Statement of the Case	2
Argument	3
Conclusion	6

Cases Cited

Galloway v. United States, 319 U.S. 372, 87 L.Ed. 1458	4
Mancia v. Potomac Electric Power Co., 268 F.(2) 793, l.c. 799, certiorari was denied 361 U.S. 913, 4 L.Ed.(2) 183	4
Neeley v. Ely Construction Company, 386 U.S. 317, 18 L.Ed.(2) 75	3
Stewart v. Sonneborn, 98 U.S. 187	5
Tennant v. Peoria and P. U. Ry. Co., 321 U.S. 29	5

Miscellaneous Cited

Moore's Federal Practice, 2nd Ed., section 38.08(5)	3
Wright and Miller, Federal Practice and Procedure, Vol. 9, No. 2522, p. 538	4

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QUESTION PRESENTED FOR REVIEW

When in an action for malicious prosecution the defendant at the close of all the evidence made a motion for directed verdict and, after it was denied the jury brought in a verdict in favor of plaintiff, and defendant thereafter, pursuant to Rule 50 (b), FRCP, filed its motion for judgment notwithstanding, which the Court sustained, the Court finding, and the evidence supporting him therein, that plaintiff failed to sustain his burden

that the attacked action was initiated without probable cause there being no contradiction in the evidence that the action was brought on advice of counsel after full disclosure of all material facts, did the granting of such judgment violate Petitioner's right of trial by jury under Amendment Seven of the Constitution?

STATEMENT OF THE CASE

The facts of the case are stated fully in the opinions of the District and Court of Appeals.

ARGUMENT

Petitioner's right of trial by jury under 7th Amendment of the Constitution was not affected or violated when the District Court sustained Respondent's motion for judgment notwithstanding pursuant to Rule 50 (b) of FRCP. The evidence was uncontradicted, it was not controverted that in filing the replevin action against plaintiff defendant had made a full and truthful disclosure to its counsel of all relevant and material information and that defendant acted and relied entirely upon the advice of its attorneys. The District Court met the standards and guidelines of Rule 50 (b) when it granted defendant judgment n.o.v., holding that the evidence was uncontroverted and undisputed, or, as the Court of appeals on page 7 of its opinion states: "Our review of the entire record along with the exhibits satisfied us that the facts themselves are not in dispute."

This Court in **Neely v. Ely Construction Company,** 386 U. S. 317, 18 L. Ed. (2) 75, had before it the question of whether under Rule 50 (b) an appellate court could direct entry of judgment for defendant. In addressing itself to the question the Court held that the granting of such judgment did not violate amendment Seven of the Constitution, the Court stating l.c. 80: "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction to the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently there is no constitutional bar to an appellate court granting judgment n.o.v."

In Moore's Federal Practice 2nd edition Section 38.08 (5), p. 87 in discussing the Seventh Amendment in connection with Rule 50 (b) it is stated:

> "When Rule 50 (b) has been complied with, the reexamination provisions do not preclude a federal district court from entering judgment, notwithstanding a verdict,

> or an appellate court from making such disposition, where as a matter of law a motion for directed verdict should have been sustained."

And directed to the same point in Wright and Miller, Federal Practice and Procedure Vol. 9 No. 2522, p. 538 it is stated:

> "The constitutionality of Rule 50 is thoroughly settled. The right to a jury trial according to the rules of the common law is preserved by the Seventh Amendment to the Constitution. It is a well established principle of the common law that although questions of fact must be decided by the jury and may not be re-examined by the court, the question of whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law to be decided by the court."

And on p. 539, referring to the constitutionality of Rule 50 (b), it is stated:

> "The authorities fully support the view that 'no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jurys' determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the perogatives of the jury.' "

This quotation was taken from **Mancia v. Potomac Electric Power Co.,** 268 F (2) 793, l.c. 799. Certorari was denied, 361 U. S. 913, 4 L. Ed. (2) 183.

And, this court in **Galloway v. United States,** 319 U. S. 372, 87 L. Ed. 1458 l.c. 1470 stated:

> "If the intention is to claim generally that the amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure, Cf. Rule 50".

The two cases cited by petitioner, neither in fact nor in law support his contention. Thus, in **Tennant v. Peoria and P.U. Ry Co.,** 321 U.S. 29, in a FELA death case, the district court held that the proof was insufficient to show proximate cause. From the opinion of this Court on certiorari it is obivous that the evidence was not uncontradicted or uncontroverted as it is here and that conflicting inferences could be deduced therefrom. Thus the Court stated:

> "In addition, the evidence relating to the rule and custom of ringing a bell, 'when the engine is about to move,' warranted a finding that Tennant was entitled to rely on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences."

In **Stewart v. Sonneborn,** 98 U.S. 187 the only error assigned was exclusively directed to the charge given the jury by the Court. This was a malicious prosecution action, the charge to the jury not requiring either the finding of malice or lack of probable cause.

In a Malicious Prosecution Action Where There Is No Dispute as to the Facts Probable Cause Is a Question of Law for the Court

We will not belabor this rule as the Court of Appeals in this case, 494 F. 2d 705, has treated it fully on page 707 of its opinion, the Court there stating that: "Unlike other tort actions the rule in malicious prosecution cases appears to be that the court determines the reasonableness of conduct. This rule is almost universally accepted in the cases." "Probable cause is a question of law for the court where there is no dispute as to the facts of the case." Rather than duplicate the thoughts and conclusions therein expressed we adopt them here by reference.

CONCLUSION

The evidence relating to the issue of probable cause being uncontradicted, the District Court in granting defendant judgment n.o.v. did so in compliance with the demands of Rule 50 (b), an action which in no degree violated or went counter to the demands of the Seventh Amendment. Respondent therefore prays that the Petition for Certiorari herein be denied.

Respectfully submitted

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